ingam v *Government of Malaysia*[1] should settle the issue. It was held there that where a husband converted to Islam, he could go to the syariah court to get his marriage dissolved, but that does not dissolve the marriage as far as the wife was concerned as the wife had not converted to Islam. Section 4 of the Law Reform (Marriage and Divorce) Act 1976 requires her marriage to be dissolved by an order of the High Court, and she could do this on the ground that the husband had converted to Islam — s 51 of the Law Reform (Marriage and Divorce) Act 1976.

There is no evidence that the deceased had obtained any dissolution of his marriage in the syariah court after his conversion to Islam, and the widow had never petitioned for or obtained, a divorce in the High Court. In *Eeswari*'s case,[1] Hashim Yeop A Sani CJ held that the widow could bring a suit and was entitled to the husband's pension under the Pensions Act 1980.

On the preliminary objection, I would make a ruling that since there is nothing to show that the syariah court has the jurisdiction conferred on it by any written law to determine the issue of whether a person is or is not a Muslim at the time of his death, this High Court is not precluded from determining that issue, and consequently to hear this application.

In the event of any appeal to the Supreme Court, I reserve the right to elaborate on this judgment.

Preliminary objection dismissed.

Solicitors: *Karpal Singh & Co; Pawancheek & Co.*

Reported by *Zarinah Marican*

Utama Wardley Bhd & Anor v Lenggang Laut Development Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-23-1358-88
SITI NORMA YAAKOB J
26 SEPTEMBER 1990

Companies and Corporations — Sale and purchase of company's shares — Financing of purchase — Syndicated facilities granted by plaintiffs to first defendant — Loan facilities secured by pledge of company's shares — Joint and several guarantee by first defendant's shareholders — Negative pledge of company's landed properties — Titles to lands deposited with plaintiffs — Whether negative pledge of company's properties financial assistance to enable its own shares to be purchased — Whether loan transaction contravened the Companies Act 1965 — Actual securities for loan — Companies Act 1965, s 67(1)

Civil Procedure — Summary judgment — Appeal — Merits of case — Whether loan transaction illegal — Amendment of defence — To plead details of securities — Securities contained in documents sufficiently identified in original defence — Amendment redundant and unnecessary — Rules of the High Court 1980, O 20

These were two matters filed by the defendants: one was a notice of appeal to set aside an O 14 judgment and the other was an application to amend their statement of defence after the judgment so as to adduce further and fresh evidence at the hearing of the appeal by the admission of an affidavit of the fourth defendant. The facts of the case were that, by a sale and purchase agreement, Asiatic Development Ltd ('Asiatic') agreed to sell its 16,793,260 shares in Paya Kamunting Development Sdn Bhd ('Paya Kamunting') to the first defendant for a consideration of $16.8m. The first defendant paid $100,000 on the date of the agreement and the balance thereof was to be settled by the first defendant in a certain manner. To finance the purchase, the first defendant obtained syndicated facilities from the plaintiffs who provided two forms of facilities: a bank guarantee for $16.7m and a loan facility for $11.7m. The loan facility was secured, inter alia, by (1) a pledge of the entire Paya Kamunting shares, (2) a joint and several guarantee by the first defendant's shareholders, and (3) a negative pledge of Paya Kamunting's landed properties for which the titles to such lands were deposited with the plaintiffs. The first defendant subsequently defaulted in its obligation to make the scheduled repayments and hence the instant action to recover sums due and owing to the plaintiffs from the first defendant as principal borrower and from the second to fifth defendants as guarantors. The defendants contended that the negative pledge of Paya Kamunting properties was a form of financial assistance to enable the Paya Kamunting shares to be purchased, hence the loan transaction on which the plaintiffs' cause of action was founded was illegal as being contrary to s 67(1) of the Companies Act 1965.

Held, dismissing the defendants' appeal and application for amendment:

(1) The proposed amendments were nothing more than to plead details of the securities provided by the defendants for the loan facilities granted by the plaintiffs. From the pleadings, it was clear that whatever securities that were given in connection with the loan facilities were all contained in documents which had been sufficiently identified in the original statement of defence. The court considered that the amendments sought for by the defendants were redundant and unnecessary as the manner of the illegal transaction which the

proposed amendments sought to introduce in the statement of defence was a matter of evidence which need not be pleaded in a statement of defence.

(2) As the only issue raised in the appeal was whether the loan transaction was caught by s 67(1) of the Companies Act 1965, the first question to be asked was what were the actual securities that were provided for the loan. The written undertaking given by Paya Kamunting was one of the conditions precedent under cl 4.2 of the loan agreement and which formed part of the first plaintiff's obligations under the same agreement. As such it could not be the real security for the loan and that was confirmed by cl 12 of the loan agreement which, when read together with cl 4.2.9, identified the security to be the mortgage of the security shares to the plaintiffs.

(3) The deposit of Paya Kamunting's titles with the plaintiffs could not be the real security for the loan as it was only one of the covenants which the first defendant was obliged to observe under cl 10 of the loan agreement. The titles were only deposited and not charged to the plaintiffs. Thus in the event of the first defendant's default of its obligations under the loan agreement, the plaintiffs could not proceed to sell any of the titles as the plaintiffs were not chargees of the lands. They did not hold any registrable interests over the titles in question.

(4) On the facts of this case, since the deposit of Paya Kamunting's titles did not contravene s 67(1) of the Companies Act 1965, the court accordingly dismissed the defendants' appeal with costs.

[Bahasa Malaysia summary

Ini adalah dua tindakan yang difailkan oleh defendan: satu adalah notis rayuan untuk mengetepikan satu penghakiman A 14 dan yang satu lagi adalah permohonan untuk meminda penyata pembelaan mereka selepas penghakiman untuk mengemukakan keterangan lanjut dan baru di pendengaran rayuan melalui kemasukan afidavit defendan keempat. Fakta kes ini adalah, melalui satu persetujuan jual-beli, Asiatic Development Ltd ('Asiatic') bersetuju menjual 16,793, 260 sahamnya di dalam Paya Kamunting Development Sdn Bhd ('Paya Kamunting') kepada defendan pertama untuk balasan $16.8m. Defendan pertama membayar $100,000 pada tarikh persetujuan dan bakinya akan diselesaikan oleh defendan pertama dalam suatu cara tertentu. Untuk membiayai pembelian itu, defendan pertama memperolehi kemudahan sindiket daripada plaintif yang memberikan dua jenis kemudahan: satu jaminan bank untuk $16.7m dan satu kemudahan pinjaman untuk $11.7m. Kemudahan pinjaman dicagar, antara lainnya, oleh (1) satu gadaian (pledge) kesemua saham Paya Kamunting itu, (2) satu jaminan bersesama dan berasingan oleh pemegang saham defendan pertama, dan (3) satu gadaian negatif harta bertanah (landed properties). Paya Kamunting dengan suratmilik tanah itu disimpan oleh plaintif. Defendan pertama kemudiannya ingkar dalam kewajipannya membuat pembayaran yang dijadualkan. Begitulah bermulanya tindakan ini untuk mendapat balik jumlah yang terhutang kepada plaintif oleh defendan pertama sebagai peminjam utama dan oleh defendan kedua hingga kelima sebagai penjamin. Defendan berhujah bahawa gadaian negatif harta Paya Kamunting adalah satu bentuk bantuan kewangan untuk membolehkan pembelian saham Paya Kamunting, jadi transaksi pinjaman yang menyokong kausa tindakan plaintif adalah tidak sah kerana bertentangan dengan s 67(1) Akta Syarikat 1965.

Diputuskan, menolak rayuan defendan dan permohonan untuk pindaan dengan kos:

(1) Pindaan yang dicadangkan itu tidak lebih daripada bertujuan membuat pliding tentang butir-butir cagaran yang diberikan oleh defendan untuk kemudahan pinjaman yang diberikan oleh plaintif. Dari pliding, adalah jelas bahawa apa-apa cagaran yang diberi bersangkutan dengan kemudahan pinjaman itu adalah terkandung di dalam dokumen yang telah dikenali dengan secukupnya di dalam penyata pembelaan asal. Mahkamah berpendapat bahawa pindaan yang dipohon oleh defendan itu berlebihan sahaja dan tidak perlu kerana cara transaksi tidak sah yang ingin diperkenalkan oleh pindaan itu di dalam penyata pembelaan adalah satu soalan keterangan yang tidak perlu dijadikan pliding di dalam penyata pembelaan.

(2) Oleh kerana isu tunggal yang ditimbulkan di dalam rayuan ini ialah sama ada transaksi pinjaman itu dihalang oleh s 67(1) Akta Syarikat 1965, soalan pertama yang mesti ditanya ialah apakah cagaran sebenar yang diberikan untuk pinjaman itu. Perjanjian bertulis yang diberikan oleh Paya Kamunting adalah salah satu daripada syarat terdahulu di bawah fasal 4.2 persetujuan pinjaman dan yang membentuk sebahagian kewajipan defendan pertama di bawah persetujuan itu. Dengan itu ia tidak boleh menjadi cagaran sebenar bagi pinjaman itu dan ini ditetapkan oleh fasal 12 persetujuan pinjaman itu yang, apabila dibaca bersama dengan fasal 4.2.9, mengenalkan cagaran itu sebagai gadai-janji saham itu kepada plaintif.

(3) Penyimpanan suratmilik Paya Kamunting dengan plaintif tidak boleh menjadi cagaran yang sebenar bagi pinjaman itu kerana ia adalah cuma salah satu waad (covenant) yang wajib diikut oleh defendan pertama di bawah fasal 10 persetujuan pinjaman itu. Suratmilik itu cuma disimpan dan tidak digadaikan kepada plaintif. Jadi, jika defendan pertama ingkar dalam kewajipannya di bawah persetujuan pinjaman, plaintif tidak boleh menjual mana-mana suratmilik itu kerana plaintif bukanlah pemegang gadaian tanah itu. Mereka tidak memegang apa-apa kepentingan yang boleh didaftar atas suratmilik yang dipertikaikan itu.

(4) Mengikut fakta kes, memandangkan yang penyimpanan suratmilik Paya Kamunting tidak melanggar s 67(1) Akta Syarikat 1965, mahkamah menolak rayuan defendan dengan kos.]

Cases referred to

1 *Cheah Theam Swee & Anor* v *Overseas Union Bank Ltd & Ors* [1989] 1 MLJ 426 (refd)
2 *Yap Sing Hock Holdings Bhd & Ors* v *Chuah Teong Hooi & Ors* [1989] 2 MLJ 503 (refd)
3 *Chung Khiaw Bank Ltd* v *Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 (refd)

Legislation referred to

Companies Act 1965 s 67(1)
Rules of the High Court 1980 O 14, O 20

MT Segaram for the defendants/appellants.
Juliana Solomon for the plaintiffs/respondents.

Cur Adv Vult

Siti Norma Yaakob J: There were two matters pending before me on 13 June 1990, and taking them in point of time, one was a notice of appeal dated 2 June 1989 filed by the defendants to set aside an O 14 judgment entered on 2 June 1989, and the other was an

application dated 10 February 1990, also filed by the defendants, to amend their statement of defence and also to adduce further and fresh evidence at the hearing of the appeal by the admission of an affidavit of the fourth defendant dated 9 February 1990.

It is clear from the pleadings that the application to amend the statement of defence was only filed after judgment under O 14 had been entered against the defendants. This, however, does not affect the defendants' application as the right to amend any pleading under O 20 can be done at any stage of the proceedings provided no injustice is done to the other parties in the proceedings. When dealing with such an application, the court has a discretion to allow leave to amend but, like any other discretion, it must be exercised judicially.

The proposed amendments sought by the defendants were nothing more than to plead details of the securities provided by the defendants for the loan facilities granted by the plaintiffs. One such security is the negative pledge of landed properties belonging to a company called Paya Kamunting Development Sdn Bhd ('Paya Kamunting'), the very same company whose shares were being purchased by the first defendant from the loan facility granted by the plaintiffs. As the defendants consider that the negative pledge of Paya Kamunting properties was a form of financial assistance to enable the Paya Kamunting shares to be purchased, it is the defendants' contention that the loan transaction on which the plaintiffs' cause of action is founded is illegal as being contrary to s 67(1) of the Companies Act 1965.

Looking at the defendants' original statement of defence dated 19 August 1988, s 67(1) has already been specifically pleaded in para 10 but the form of financial assistance mentioned as having been given by Paya Kamunting was the pledge of the very same shares to be purchased by the first defendant. However, para 13 of the original statement of defence goes further to specify that, in addition to pledging its shares, Paya Kamunting had also pledged its 'other assets' with the plaintiffs. I consider that the words 'other assets' are wide enough to include the pledge of Paya Kamunting's landed properties as well, if indeed there had been such a pledge.

From the pleadings, it is clear that whatever securities that were given in connection with the loan facilities are all contained in the plaintiffs' letter of offer dated 22 August 1983, the loan agreement dated 30 August 1983 and the guarantee and indemnity also dated 30 August 1983. As all these documents have been sufficiently identified in the original statement of defence, I consider that the amendments sought for by the defendants are redundant and unnecessary, as the manner of the illegal transaction which the proposed amendments seek to introduce in the statement of defence is a matter of evidence which need not be pleaded in a statement of defence. In any event, the original statement of defence has already pleaded s 67(1) on which the defendants rely to hold the loan transaction a nullity and this plea, I consider, is sufficient to warn the plaintiffs that evidence of how that illegal transaction had taken place, by the creation of a security which, directly or indirectly, amounts to a company rendering financial assistance in the connection of a purchase of its shares, will be adduced by the defendants. Since the purpose of amending a pleading is to state clearly what the issues are so that the other party will not be taken by surprise and since the defendants' original statement of defence has clearly identified the issues, I had considered that the defendants' proposed amendments are quite unnecessary and redundant. On that finding, I had accordingly dismissed the defendants' application with costs.

Turning to the fourth defendant's affidavit dated 9 February 1990, which the defendants seek to use in the subsequent hearing of the appeal against the O 14 judgment, I find that there is nothing new affirmed in the affidavit that has not already been alluded to in the fourth defendant's earlier affidavit dated 18 November 1988 and which had been relied upon by the defendants to dispute their liability in the summary proceedings before the senior assistant registrar. The deposit of Paya Kamunting titles with the plaintiffs is already confirmed by the documentary evidence attached to the fourth defendant's earlier affidavit and, as far as I can see, the fourth defendant's affidavit dated 9 February 1990 introduces no fresh evidence which is not already apparent in the pleadings and in the documentary exhibits. On that basis, I had also ruled that prayer 2 of the defendants' application to adduce fresh evidence is unnecessary and redundant and I had accordingly disallowed it with costs.

Coming now to the merits of the appeal, it is necessary that I first outline the background of the parties' business transaction with each other so that the issues can be clearly identified and determined.

Following a sale and purchase agreement dated 19 May 1983, Asiatic Development Limited ('Asiatic') agreed to sell all its 16,793,260 shares in Paya Kamunting to the first defendant for a consideration of $16.8m. The first defendant paid $100,000 on the date of the agreement and the balance of the purchase price was to be settled by the first defendant in the following manner:

(1) $5.4m to be paid within 60 days of FIC's approval for the purchase, such payment to be secured by an irrevocable and unconditional bank guarantee; and
(2) the remaining $11.3m to be paid within 365 days of FIC's approval for the purchase, payment for which was also to be secured by another irrevocable and unconditional bank guarantee for that amount.

To finance the purchase, the first defendant turned to the plaintiffs and in the plaintiffs' letter of offer dated 22 August 1983, the following facilities were approved in favour of the defendants:

(1) A guarantee facility of $16.7m for one year from 22 August 1983. This bank guarantee is to fulfil the requirements of the two guarantees as I have stated in (1) and (2) above; and
(2) a loan facility of $11.7m for two years from 20 September 1983.

As the facilities provided were syndicated facilities, the first plaintiff was to provide $5m towards the guarantee and $3.7m towards the loan with the second plaintiff providing the remaining $11.7m towards the guarantee and $8m towards the loan. So it is clear from the letter of offer itself that the plaintiffs provided two forms of facilities: a bank guarantee for $16.7m and a loan facility for $11.7m.

Putting aside the bank guarantee, I shall now deal directly with the loan facility as the plaintiffs' cause of action is founded on the loan facility. Under the terms of the plaintiffs' letter of offer, the initial drawdown of $5.4m was to be made on or before 20 September 1983 and the balance of $6.3m on or before 21 July 1984. Repayment by the first defendant was to be in five quarterly instalments of $2.34m each, the first commencing on 20 September 1984 and thereafter on 20 December 1984, 20 March 1985, 20 June 1985 and 20 September 1985. The loan should be fully repaid 24 months after the date of the initial drawdown, ie on or before 20 September 1985.

The loan facility was secured, inter alia, by:

(1) a pledge of the entire Paya Kamunting shares;
(2) a joint and several guarantee by the first defendant's shareholders;
(3) a negative pledge of Paya Kamunting's landed properties and, for this purpose, the titles to such lands were deposited with the plaintiffs;
(4) an undertaking that Paya Kamunting's total actual and contingent liabilities should not exceed $1m at any one time; and
(5) an undertaking that all proceeds of sale of any of Paya Kamunting's lands should be deposited with the plaintiffs.

These terms were accepted by the first defendant and a loan agreement dated 30 August 1983 was executed by the plaintiffs as lenders and the first defendant as borrower. In the loan agreement too, the term loan of $11.7m is described as 'a facility'. A memorandum of deposit of shares also dated 30 August 1983 was also executed by the first defendant with the plaintiffs whereby the first defendant charged its title, right and interests in the 16,793,260 Paya Kamunting shares to the plaintiffs. The other security, a guarantee and indemnity also dated 30 August 1983 was executed by the second to fifth defendants guaranteeing the repayment of the loan.

Pursuant to the first defendant's written requests made on 16 September 1983 and 20 July 1984, the plaintiffs released the full extent of the loan in two drawdowns of $5.4m and $6.3m respectively. The first repayment instalment of $2.34m was to have been made by the first defendant on 20 September 1984 but following the first defendant's request for a deferment of repayment on the first two instalments, the plaintiffs agreed to defer repayment of the first two instalments to 20 March 1985 together with the third instalment, the last two instalments to remain on the dates earlier agreed provided that the first defendant pay all overdue interest together with penalty interest in full. The first defendant, however, defaulted in its obligation to make such repayments and hence the instant action to recover sums due and owing to the plaintiffs in the proportion of their entitlements from the first defendant as principal borrower and the second to fifth defendants as guarantors.

As the only issue raised in the appeal is whether the loan transaction is caught by s 67(1) of the Companies Act 1965, the first question to be asked is: what were the actual securities that were provided for the loan? The defendants claim that since Paya Kamunting had given an undertaking to the plaintiffs under cl 4.2.3 of the loan agreement, that its total actual and contingent liabilities shall not at any one time exceed $1m and that the titles of its landed properties identified in cl 1.1.27 of the loan agreement had been deposited with the plaintiffs under cl 10.1.6 of the loan agreement, Paya Kamunting has provided financial assistance to the defendants in connection with the purchase of its shares and the loan transaction is therefore void under s 67(1) of the Companies Act 1965.

The written undertaking given by Paya Kamunting is one of the conditions precedent under cl 4.2 of the loan agreement and which forms part of the first defendant's obligations under the same agreement. As such, it cannot be the real security for the loan. This is confirmed by cl 12 of the loan agreement which, when read together with cl 4.2.9, identifies the security to be the mortgage of the security shares to the plaintiffs. Security shares is defined in cl 1.1.31 to mean the Paya Kamunting shares.

As the purpose of the loan as spelt out under cl 3.1 is to make payment for the Paya Kamunting shares pursuant to the sale and purchase agreement dated 19 May 1983 and executed by the first defendant with Asiatic, the undertaking given by Paya Kamunting can only mean that the value of the shares purchased shall not be unduly burdened or made worthless by Paya Kamun-

ting's liabilities and, for that purpose, the plaintiffs were only prepared to allow Paya Kamunting to incur liabilities not exceeding $1m at any one time for so long as the first defendant's indebtedness to the plaintiffs remain outstanding.

For that matter, the deposit of Paya Kamunting's titles with the plaintiffs under cl 10.1.6 of the loan agreement cannot be the real security for the loan as it is only one of the convenants which the first defendant is obliged to observe under cl 10. The titles are only deposited and not charged to the plaintiffs. Thus, in the event of the first defendant's default of its obligations under the loan agreement, the plaintiffs cannot proceed to sell any of the titles as the plaintiffs are not chargees of the lands. They do not hold any registrable interests over the titles in question. It is because of this that the deposit of the titles has been described as a negative pledge in the plaintiffs' letter of offer.

The defendants, however, attempted to establish that the deposit of the titles had the effect of giving the plaintiffs a registrable interest and for this they relied on a number of authorities where the facts show that titles were in fact charged by the borrower to the lenders: see the cases of *Cheah Theam Swee & Anor* v *Overseas Union Bank Ltd & Ors*[1] and *Yap Sing Hock Holdings Bhd & Ors* v *Chuah Teong Hooi & Ors*,[2] where the securities were provided by a third party and not by the company whose shares were being purchased. Again in *Chung Khiaw Bank Ltd* v *Hotel Rasa Sayang Sdn Bhd & Anor*,[3] the contravention is clear as the security was given by the hotel whose shares were being purchased.

In this case, as the titles were only deposited with the plaintiffs, Paya Kamunting can, for good reason, request for the release of any of its titles and the plaintiffs cannot unreasonably withhold releasing the title. In fact, such a request was made in March 1986 to enable Paya Kamunting to provide the title as a security for a loan of $10m granted by the Co-operative Central Bank to the fourth defendant. For this release, $3m had been paid to the plaintiffs' account but I do not consider this a contravention of s 67(1) as the transaction took place in 1986. For there to be any contravention, the defendants must establish that the contravention took place in 1983 when the loan of $11.7m was granted to the first defendant.

On the facts of this case, since the deposit of the Paya Kamunting's titles does not, I consider, contravene s 67(1) of the Companies Act 1965, I had accordingly dismissed the defendants' appeal with costs.

Appeal dismissed.

Solicitors: *M Segaram & Co; Rashid & Lee.*

Reported by *Eunice Lee*

Lee Kuan Yew v Chin Vui Khen & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S6-25-235-87
SITI NORMA YAAKOB J
6 JULY 1989

Civil Procedure — Further and better particulars — Striking out of — Principles applicable

Tort — Defamation — Pleading of — Particulars to be provided

Tort — Defamation — Whether consistent with constitutional right of freedom of speech

Constitutional Law — Freedom of speech and expression — Restrictions imposed by law

The defendants published two articles in the *Sunday Star*, an English language newspaper widely circulated in Malaysia, commenting on the suicide of Mr Teh Cheang Wan, the then Minister of National Development in Singapore and the collapse of the National Bank of Brunei. These articles in particular commented on the effect of these incidents on the image of Singapore and on the plaintiff, then the Prime Minister of Singapore.

The plaintiff sued the defendants for defamation. In their defence, the defendants pleaded, inter alia, justification, fair comment and the protection of art 10 of the Federal Constitution (right to freedom of speech and expression). The plaintiff successfully applied for the defendants to give further particulars of the defences of justification and fair comment. The defendants accordingly filed further and better particulars. The plaintiff was not satisfied with the manner the particulars were filed and applied to have them struck out. He also applied to strike out the defence based on art 10.

The court first dealt with the application to strike out the particulars. After hearing arguments, the court ordered the defendants to restate their further and better particulars. Pursuant to this, the defendants supplied the second set of further and better particulars. The defendants listed out extracts of the articles, described them as 'comment', 'statement of fact' etc and then listed particulars. The plaintiffs applied again to strike out the particulars as well as the defence based on the Federal Constitution.

Held, granting the application:

(1) Reference to documents alone cannot be regarded as the particulars of the fact that the defendants have been ordered to furnish; such reference points more to the nature of the evidence which the defendants intend to produce at the trial.

(2) When the words complained of allude to general charges, a defendant who pleads justification must state some specific acts and instances of misconduct imputed to the plaintiff supported by precise particulars of fact as tending to show the truth of such misconduct.

(3) In this case, the particulars supplied by the defendants are too general as to embarrass the plaintiff as he does not know the precise acts he is alleged to have done which justify the charges against him.

(4) The defendants have pleaded justification and fair comment separately, and thus are relying on them as two distinct and separate defences. Thus pleading the general particulars as the defendants have done is quite unnecessary and redundant.